

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-220380

DATE: November 1, 1985

MATTER OF: Mechanical Equipment Company, Inc.

## DIGEST:

1. Bid on total small business set-aside which indicates in the appropriate block that not all supplies to be furnished will be the product of a small business concern is not responsive and may not be considered for award because bidder would be free to furnish supplies from a large business and thus defeat the purpose of the set-aside.
2. Bid on total small business set-aside rejected as nonresponsive because bidder indicated that not all supplies to be furnished will be the product of a small business concern may not be cured or defect waived as a minor informality since responsiveness must be determined from material available at bid opening and postopening explanations cannot be considered to correct a nonresponsive bid.

Mechanical Equipment Company, Inc. (MECO) protests the rejection of its bid under invitation for bids (IFB) No. N00104-85-B-0933 issued by the Department of the Navy as a total small business set-aside. MECO's bid was rejected as nonresponsive because it indicated that not all supplies to be furnished would be manufactured by a small business.

We deny the protest. We do so without obtaining a report from the contracting agency, since it is clear from the information furnished by MECO that the protest is without merit. 4 C.F.R. § 21.3(f) (1985).

The IFB contained the standard Small Business Concern Representation set forth in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.219-1 (1984). MECO indicated in that representation that it was a small business concern

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but that "not all supplies to be furnished will be manufactured or produced by a small business concern in the United States, its possessions or Puerto Rico." As a result, the Navy rejected the bid as nonresponsive.

MECO argues that its bid is responsive since the Notice of Small Business Set-Aside, 48 C.F.R. § 52.219-6, requires manufacturers to provide end items manufactured by small business concerns and MECO submitted its bid with this provision being applicable. Also, MECO argues that the Small Business Representation clause is ambiguous and that MECO mistakenly interpreted the words "all supplies" to include all raw materials and components which would be purchased to complete the contract. MECO asserts that the ambiguity should be resolved in its favor and its misinterpretation should be waived or corrected.

While we have held that the failure to complete the small business size status portion of the representation is a waivable minor informality, Extinguisher Service, Inc., B-214354, June 14, 1984, 84-1 CPD ¶ 629, we have distinguished this from the second portion of the representation which concerns a matter of responsiveness because it involves an obligation to provide supplies manufactured by a small business concern, a key element of a small business set-aside for supplies. If a bid on a small business set-aside fails to establish the legal obligation of the bidder to furnish supplies manufactured or produced by a small business, the bid is nonresponsive and must be rejected. See Mountaineer Leathers, Inc., B-218453, May 6, 1985, 85-1 CPD ¶ 505, and decisions cited therein. Here, despite MECO's representations elsewhere in its bid, MECO also represented that not all the supplies it furnished would be the products of a small business concern. As such, MECO's bid does not legally obligate the contractor to furnish small business products consistent with the set-aside, but rather creates an ambiguity which requires rejection of the bid. Polan Industries, B-218720.2, May 30, 1985, 85-1 CPD ¶ 617; ATD-America, Co., B-217290, Jan. 23, 1985, 85-1 CPD ¶ 91.

Further, postopening explanations cannot be used to waive the objectionable certification, or otherwise to correct a nonresponsive bid, even where the government could obtain a lower price by accepting the corrected bid. Basic Marine, Inc., B-215236, June 5, 1984, 84-1 CPD ¶ 603; Mechanical Mirror Works, Inc., B-210750.2, Oct. 20, 1983, 83-2 CPD ¶ 467. Accordingly, since MECO's intent to supply items manufactured by a small business

concern was not clearly ascertainable from the face of the bid, the contracting officer properly rejected the bid as nonresponsive.

MECO's assertion that it misinterpreted the Small Business Concern Representation clause used in the solicitation due to the ambiguity of that clause does not provide a basis for accepting MECO's bid. This same assertion was considered and rejected as a basis for protest in Mountaineer Leathers, Inc., B-218453, supra, where we stated as follows:

" . . . Although the law in this situation is well-settled and does not provide a basis for accepting Mountaineer's bid, there have been a number of recent cases, such as those cited throughout this decision--in which bidders have alleged that they submitted nonresponsive bids through misinterpreting the Small Business Concern Representation clause (Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.219-1 (1984)). We are, therefore, by letters of today, expressing our concern to the FAR Secretariat and to the Administrator, Small Business Administration, that this may be an appropriate matter for review and consideration of clarifying changes to the wording of the Small Business Concern Representation clause."

The protest is denied.

*for* *Seymour Efron*  
Harry R. Van Cleve  
General Counsel